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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 104

PARMELEE TRANSPORTATION CO.,

*Appellant-Petitioner.*

vs.

THE ATCHISON, TOPEKA AND SANTA FE  
RAILWAY COMPANY, ET AL.,

*Appellees-Respondents.*

On Appeal from and Writ of Certiorari to the United States  
Court of Appeals for the Seventh Circuit

## BRIEF OF APPELLEES-RESPONDENTS

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Parmelee misapprehends the basic issues. Parmelee treats the transfer operation as a motor vehicle service not subject to the Interstate Commerce Act, whereas in truth the service is a railroad operation subject to Part I of the Act and other federal statutes. Parmelee says that the Court of Appeals held invalid all of the sections relating to terminal vehicles in Chapter 28 of the Chicago Municipal Code, whereas in truth the Court held invalid only § 28-31.1. This section conflicts directly with the Commerce Clause and with federal statutes regulating the transfer service and thus was rightly held invalid by the Court of Appeals .....	15
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Section 28-31.1 of Chapter 28 is invalid on its face as applied to the interstate commerce here involved. It is all one piece and the railroads could not be required to comply with it under any possible assumptions.

## ANSWER TO PARMELEE'S PART VI

If 28-31.1 is taken at face value it is invalid on its face. Parmelee's attempts to construe it to mean something else than what it says on its face, in an attempt to save it, affords occasion for proper resort to legislative history.

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Parmelee's Part VII argument apparently assumes that the Court of Appeals held all of Chapter 28 invalid, and the argument is thus without foundation. But if Parmelee means by "sanctions" the power to determine who shall engage in interstate commerce, then the argument is doubly erroneous.

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On Appeal from and Writ of Certiorari to the United States  
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**BRIEF OF APPELLEES-RESPONDENTS**

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**QUESTIONS PRESENTED**

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*Appellees-Respondents agree with appellant-petitioner  
that the first two questions presented are:*

1. Whether the judgment of the Court of Appeals is  
appealable under 28 U.S.C. § 1254 (2).

2. Whether appellant-petitioner has standing to main-  
tain this appeal and petition for certiorari.

2

*Appellees-Respondents will submit that the remaining questions presented are:*

3. May the City of Chicago forbid appellee-respondent railroads to engage in interstate commerce authorized by federal statutes unless the railroads prove to the City's satisfaction that public convenience and necessity requires such interstate commerce.

4. Assuming that the answer to question No. 3 is "no," must appellee-respondent railroads "exhaust their administrative remedies" by applying to the City to pass an ordinance finding that public convenience and necessity requires the railroads to engage in interstate commerce authorized by federal statutes.

5. When appellant-petitioner argues that an ordinance has a meaning different from its plain terms, whether resort to legislative history can be had for the purpose of showing that the ordinance means what it says.

## STATEMENT OF THE CASE

The statements of the case in Nos. 103 and 104 are identical except as to the first paragraph of each entitled "The Parties."

### THE PARTIES

Appellees-respondents are the 21 railroads having passenger terminals in Chicago and Railroad Transfer Service, Inc., with whom the railroads have a contract for the interstation transfer of passengers in Chicago (R. 25-43). For brevity and clarity they will hereafter sometimes be called the railroads and Transfer. Appellees-respondents sued the City of Chicago and its officials in United States District Court for declaratory judgment that a recently amended ordinance regulating transfer of passengers between stations is invalid under the Commerce Clause, and for injunction against its enforcement (R. 4-54). Appellant-petitioner Parmelee Transportation Company was granted leave to intervene as a defendant under Rule 24(b) over the objections of appellees-respondents (R. 58-61, 65-68). The City moved for summary judgment which was granted and the Court dismissed the complaint (R. 71-72, 99-112, 155-160). The Court of Appeals held the ordinance applicable and valid except as to one section which the Court held invalid under the Commerce Clause (R. 196-213).

### INTERSTATION TRANSFER OF RAILWAY PASSENGERS IN CHICAGO

For many years the railroads have provided by tariffs for transfer of through passengers and their baggage between downtown Chicago stations. There are eight passenger terminals in downtown Chicago, each being used by from one to six railroads (R. 7). No one railroad passes through Chicago, but a very large number of railroad passengers travel through Chicago every day whose continuous

journeys begin and end at points outside of Chicago, and these transfer at Chicago from the incoming to the outgoing railroad (R. 7-8, 48-49). Approximately 3900 per day of these passengers transfer between incoming and outgoing railroads that are located in different terminal stations (R. 49). The only practical method of transferring these passengers is by motor vehicle equipped to carry such passengers and their accompanying hand baggage simultaneously (R. 7-9, 49). More than 99 per cent of the passengers so transferred between different terminal stations are traveling on through tickets between origin and destination points located in different states (R. 7, 49), and their transfer is therefore interstate commerce (R. 202).

This through transportation from origin to destination via different railroads through Chicago is provided pursuant to tariffs filed with the Interstate Commerce Commission and with the Illinois Commerce Commission (R. 7-8, 74-79, 190-195). Under applicable tariffs the through passenger transportation service includes any required passenger and baggage transfer service from the terminal station in Chicago of the incoming line to the terminal station in Chicago of the outgoing line (R. 8-9).

Pursuant to such tariffs a passenger traveling through Chicago purchases at his point of origin a railroad ticket composed of a series of coupons covering his complete transportation to his destination (R. 8, 49). If his through journey requires him to transfer from one railroad passenger terminal in Chicago to another, a part of his ticket consists of a coupon good for the transfer of himself and his baggage between such terminals (R. 8-9, 49). The tariffs provide that any such required transfer service shall be without additional charge where the fare exceeds a low minimum (R. 8, 74-79, 190-195). The expense of the transfer service is absorbed by the railroads (R. 8).

Upon arrival in Chicago the through passenger delivers the transfer coupon to the railroads' transfer agent, whereupon the transfer agent carries the passenger and his baggage from the incoming to the outgoing station without further charge (R. 26-29). The transfer agent is compensated by a specified payment to it per coupon by the outgoing terminal railroad (R. 29-31).

### REGULATION OF THE INTERSTATION TRANSFER SERVICE BY THE CITY OF CHICAGO

The City of Chicago has regulated the interstation transfer vehicles for many years by Chapter 28 of the Chicago Municipal Code. This chapter regulates all "public passenger vehicles" and includes the transfer vehicles which it defines as "terminal vehicles." Prior to July 26, 1955, terminal vehicles were covered only by §§ 28-1 to 28-18, 28-31, and 28-32 of Chapter 28 (R. 171-189). These sections of Chapter 28 are not in issue, having been found applicable and valid by the Court of Appeals (R. 208-209; 200). They require a license for identification and regulation (R. 173, 174, 177 §§ 28-2, 28-5; 28-10, 28-11), an annual license fee (R. 175 § 28-7), observance of safety regulations (R. 173, 174, 181 §§ 28-4, 28-4.1, 28-17), and carrying insurance (R. 178 § 28-12). These provisions may be enforced by suspension or revocation of the license and by fines for violations (R. 179, 180, 189 §§ 28-14, 28-15, 28-32; R. 208-209).

On June 13, 1955, the railroads announced that effective October 1, 1955, they were discontinuing their arrangements with Parmelee Transportation Co. for performance of the transfer service and had made a contract with Railroad Transfer Service, Inc., for this purpose (R. 82, 25-43). Parmelee so informed the Chairman of the Committee on Local Transportation of the Chicago City Council, and on June 16, 1955, the Chairman introduced a proposed ordi-

nance which would give Parmelee an exclusive ten-year franchise to perform interstation transfer service (R. 85-89, 44, 93-95, 201 footnote 12 and related text). The Committee on Local Transportation considered the matter on July 21, 1955, and laid the proposed ordinance aside (R. 90-95); but on July 26, 1955, the Committee recommended an amendment of Chapter 28 to the Council for passage (R. 95) and it was passed the same day (R. 44-45).

This amendment (R. 44-45) made two material changes in Chapter 28: (1) It changed the definition of terminal vehicle so as to remove a previously existing requirement that a terminal vehicle operator must have a contract with railroads. (2) It gave Parmelee permanent terminal vehicle licenses for all of its vehicles and it provided that before the railroads and Transfer may operate any terminal vehicles they must prove that public convenience and necessity requires such operation.

Thus before the amendment "terminal vehicle" was defined as follows (R. 172, 188-189):

"Terminal vehicle" means a public passenger vehicle which is operated under contracts with railroad and steamship companies, exclusively for the transfer of passengers from terminal stations."

"28-31. No person shall be qualified for a terminal vehicle license unless he has a contract with one or more railroad or steamship companies, for the transportation of their passengers from terminal stations.

"It is unlawful to operate a terminal vehicle for the transportation of passengers for hire except for their transfer from terminal stations to destinations in the area bounded on the north by E. and W. Ohio street; on the west by N. and S. Desplaines street; on the south by E. and W. Roosevelt Road; and on the east by Lake Michigan."

These provisions were changed by the July 26, 1955, amendment to read as follows (R. 44-45):

"Terminal vehicle' means a public passenger vehicle which is operated exclusively for the transportation of passengers from railroad terminal stations and steamship docks to points within the area defined in Section 28-31."

"28-31 Terminal Vehicles) Terminal vehicles shall not be used for transportation of passengers for hire except from railroad terminal stations and steamship docks to destinations in the area bounded on the north by E. and W. Ohio Street; on the west by N. and S. Desplaines Street; on the south by E. and W. Roosevelt Road; and on the east by Lake Michigan."

Thus the requirement of a contract with the railroads was removed from the definition by the amendment. The area of operation defined in both the repealed and the new sections just includes the eight downtown railroad stations.

The grant of permanent licenses to Parmelee and the requirement that the railroads and Transfer prove public convenience and necessity before operating any vehicles were accomplished by adding to Chapter 28 a new section, 28-31.1 (R. 44-45):

"28-31.1 Public Convenience and Necessity) No license for any terminal vehicle shall be issued except in the annual renewal of such license or upon transfer to permit replacement of a vehicle for that licensed unless, after a public hearing held in the same manner as specified for hearings in Section 28-22.f, the commissioner shall report to the council that public convenience and necessity require additional terminal vehicle service and shall recommend the number of such vehicle licenses which may be issued.

"In determining whether public convenience and necessity require additional terminal vehicle service due

consideration shall be given to the following:

1. The public demand for such service;
2. The effect of an increase in the number of such vehicles on the safety of existing vehicular and pedestrian traffic in the area of their operation;
3. The effect of an increase in the number of such vehicles upon the ability of the licensee to continue rendering the required service at reasonable fares and charges to provide revenue sufficient to pay for all costs of such service, including fair and equitable wages and compensation for licensee's employees and a fair return on the investment in property devoted to such service;
4. Any other facts which the commissioner may deem relevant.

If the commissioner shall report that public convenience and necessity require additional terminal vehicle service, the council, by ordinance, may fix the maximum number of terminal vehicle licenses to be issued not to exceed the number recommended by the commissioner."

The foregoing § 28-31.1 was held invalid by the Court of Appeals (R. 208).

#### COMMENCEMENT OF THE LITIGATION

The railroads and Transfer advised the City that Chapter 28 as amended July 26, 1955, did not apply to their transfer operation arranged by the contract between them (R. 25-43), but that if it did apply it was invalid because of conflict with the Commerce Clause; but nevertheless, the City asserted that the ordinance as amended did apply to such transfer service, and was valid, and that the City would enforce it against the railroads and Transfer (R. 6-7 § 4). Thereafter the railroads and Transfer sued in District Court for declaratory judgment that the ordinance

is inapplicable, but that if applicable, it violates the Commerce Clause, and asked for injunction against its enforcement (R. 4-54). Parmelee was permitted to intervene as a defendant under Rule 24(b) over objection of the railroads and Transfer (R. 58-61, 65-68). The City moved for summary judgment (R. 71-72).

The District Court held Chapter 28 applicable to respondents and valid (R. 99-112, 155-159), and entered final judgment (R. 160):

"\* \* \* that summary judgment be entered in favor of the defendants against the plaintiffs, with costs, and that this action be and it is hereby dismissed."

The railroads and Transfer appealed from this judgment to the Court of Appeals (R. 161-162).

In the Court of Appeals the City and Parmelee strongly asserted and argued in their joint brief (1) that Chapter 28 is applicable to the interstation transfer service, and (2) that Chapter 28 is valid in all respects. (Certified copy of this brief is filed here.)

The Court of Appeals held Chapter 28 applicable to the transfer service (R. 208-209, 200) but held § 28-31.1 (R. 44-45) to be invalid because in conflict with the Interstate Commerce Act and the Commerce Clause (R. 208, 204-211).

## SUMMARY OF ARGUMENT

### 1.

The judgment of the Court of Appeals would be appealable under 28 U.S.C. § 1254 (2) by one having standing to appeal, since the judgment is final. The Court held § 28-31.1 of Chapter 28 of the Chicago Municipal Code invalid but held the rest of Chapter 28 applicable and valid. It thus disposed of every issue in the case and left nothing for the District Court to decide.

### 2.

Appellant-Petitioner Parmelee lacks standing to seek review on appeal or by writ of certiorari. The ordinance which Parmelee is defending, § 28-31.1, requires proof of public convenience and necessity to the satisfaction of the City of Chicago before engaging in interstate commerce. Parmelee claims that this ordinance gives Parmelee the right to object to performance of interstate commerce by one not licensed under the ordinance. But since the City has no power to impose such a requirement, Parmelee can derive no right as a party in interest from that void.

### 3.

The interstation transfer service which is being performed under the contract between appellee-respondent railroads and appellee-respondent Transfer (R. 25-43) is railroad transportation subject to Part I of the Interstate Commerce Act by force of 49 U.S.C. § 302(c)(2). The effect of this statute is to merge the identity of Transfer into the railroads so that the transfer operation is simply and wholly railroad operation.

The interstation transfer service is performed pursuant to tariffs filed by the railroads with the Interstate Com-

merce Commission and with the Illinois Commerce Commission. While these tariffs remain in effect they have the force and effect of statutes compelling the railroads to perform the transfer service. The Interstate Commerce Commission regulates service performed under § 302(c)(2) and has power to compel performance of the service. Other Federal statutes including 49 U.S.C. § 3(4) and 45 U.S.C. § 84 authorize and compel the railroads to perform the service.

These Federal statutes supersede the power of the City of Chicago to enforce § 28-31.1 of Chapter 28 against the railroads and Transfer in the performance of the inter-station transfer service. It would be impossible for the railroads to perform their obligations under their tariffs and under these Federal statutes if the City were to exercise the powers asserted in § 28-31.1.

The railroad communication and interchange act of 1866, 45 U.S.C. § 84, was enacted for the express purpose of preventing obstructions to interstate commerce like § 28-31.1 of Chapter 28. One of its purposes, as its legislative history shows, was to make the principle of *Gibbons v. Ogden*, 9 Wheaton 1 (1824), applicable to interstate railroad operation. The instant case affords a perfect example for the application of *Gibbons v. Ogden*.

The telegraph act of 1866 was enacted to prevent state obstructions of interstate telegraph companies, and the decision of this Court in *Pensacola Telegraph Co. v. Western Union Telegraph Co.*, 96 U.S. 1 (1878), construing the telegraph act and holding a conflicting Florida Act invalid, is indistinguishable from the issue in the instant case.

*Castle v. Hayes Freight Lines*, 348 U.S. 61 (1954), has roots running directly to the railroad and telegraph acts

of 1866 and to the decisions construing them. The *Hayes* case is direct authority that § 28-31.1 is invalid.

The authorities upon which appellant-petitioner Parmelee relies are cases involving motor carriers not subject to the Interstate Commerce Act or any other regulation. Since the interstation transfer service is railroad service and is fully subject to regulation under Part I of the Interstate Commerce Act, Parmelee's authorities are not relevant. Moreover, no decision of this Court has ever sustained an enactment similar to § 28-31.1. Instead, every statute of this character that has come before the Court has been held invalid under the Commerce Clause even in the absence of any superseding federal legislation.

#### 4.

Appellant-Petitioner Parmelee argues that the Court of Appeals erred in presuming that the ordinance would be unconstitutionally applied, and further argues that the railroads and Transfer should be required to "exhaust their administrative remedies" before attacking the validity of the ordinance. There is no merit in these arguments. Section 28-31.1 requires proof of public convenience and necessity before engaging in interstate commerce and thus is invalid on its face. It contains no other standards which could be applied. The very first step required under it is to apply for a certificate of public convenience and necessity to engage in interstate commerce, and such an application cannot constitutionally be required in the first instance. Hence there is no possibility for construing the statute otherwise than as invalid, and appellees-respondents cannot be required to "exhaust their administrative remedies" by making an application for permission to prove public convenience and necessity to engage in interstate commerce.

Parmelee argues that the phrase "public convenience and necessity" may be construed to include power which the City has the right to exercise, but this claim is without merit. Both the Supreme Court of Illinois and this Court have uniformly construed the phrase to include only economic regulation of transportation and not any elements of the police power. Moreover, the City has no right under the police power to determine who shall perform the inter-station transfer service under 49 U.S.C. § 302(c)(2).

## 5.

Parmelee asserts that the Court of Appeals erred in resorting to the legislative history of § 28-31.1. The Court held that § 28-31.1 was invalid on its face, but in response to an argument by Parmelee that the section should be given a construction different from its plain terms the Court looked to the legislative history and determined that the section meant what it said. The legislative history is not necessary to the Court's conclusion that the section is invalid and it bears only on Parmelee's argument that the words "public convenience and necessity" should be given a construction different from that universally given them by the Supreme Court of Illinois and by this Court.

However, the legislative history is so pervading and so public that it is independently relevant and it need not be ignored in the consideration of this case.

## 6.

Since only § 28-31.1 of Chapter 28 was held invalid, there remain in Chapter 28 licensing provisions as comprehensive as legitimate exercise of the police power can permit. Therefore there is no basis for Parmelee's argument that the Court of Appeals substituted its judgment for the judgment of the City Council as to whether licensing of the terminal vehicle operation is necessary.

## ARGUMENT

1.

### ANSWER TO PARMELEE'S PART I

The judgment of the Court of Appeals is appealable under 28 U.S.C. § 1254 (2).

Candor requires the position that the judgment would be appealable by one having standing to appeal. The Court held § 28-31 of Chapter 28, Chicago Municipal Code (R. 44-45), invalid because in conflict with the Commerce Clause and the Interstate Commerce Act (R. 208). It held the rest of Chapter 28 (R. 171-189) applicable and valid (R. 208-210, 290). It thus disposed of every issue and remanded the cause to the District Court "for further proceedings not inconsistent with the views expressed in the opinion of this Court filed this day." (R. 212-213). That is a final judgment. *Gulf Refining Co. v. United States*, 269 U.S. 125, 135-136 (1925); *Johnson v. Muelberger*, 340 U.S. 581, 583 (1951); *Richfield Oil Corp. v. State Board of Equalization*, 329 U.S. 69, 73 (1946).

2.

### ANSWER TO PARMELEE'S PART II

Parmelee lacks standing to seek review on appeal or by writ of certiorari.

To establish standing Parmelee relies, pp. 21-22, entirely on *Frost v. Corporation Commission*, 278 U.S. 515 (1929), and *Alton Railroad Co. v. United States*, 315 U.S. 15 (1942). Far from supporting, these cases prove lack of standing.

In the *Alton* case, 49 U.S.C. § 305(g) gave right of review to "any party in interest," but it did not define those terms. The Court held that status as a "party in interest" accrued

from 49 U.S.C. §§ 306(a), 307(a), which require that one proposing to engage in interstate commerce prove public convenience and necessity. The Court held, pp. 19-20, citing legislative history, that these sections were intended, *inter alia*, for the protection of the economic interests of the railroads in their competition with motor carriers, and that the railroads had the right to protect that economic interest by review of Commission action under these sections.

Parmelee equates § 28-31.1, Chapter 28, Chicago Municipal Code, with 49 U.S.C. §§ 306(a), 307(a). We agree that the equation is perfect, but it clearly proves that Parmelee lacks standing. The City has no power to determine whether proposed interstate commerce is required by public convenience and necessity, has no power to protect the economic interest of Parmelee in competition with other interstate carriers; and no right as a party in interest to object to proposed interstate commerce can accrue to Parmelee from that void.

The *Frost* case, 278 U.S. 515, is in accord with the *Alton* decision, but *Frost* involved only intrastate commerce.

### 3.

#### ANSWER TO PARMELEE'S PART III

Parmelee misapprehends the basic issues. Parmelee treats the transfer operation as a motor vehicle service not subject to the Interstate Commerce Act, whereas in truth the service is a railroad operation subject to Part I of the Act and other federal statutes. Parmelee says that the Court of Appeals held invalid all of the sections relating to terminal vehicles in Chapter 28 of the Chicago Municipal Code, whereas in truth the Court held invalid only § 28-31.1. This section conflicts directly with the Commerce Clause and with federal statutes regulating the transfer service and thus was rightly held invalid by the Court of Appeals.

## PARMELEE'S BASIC ERRORS

Parmelee argues, Part III, p. 27, that "the City may require a license as a means of effectuating its legitimate interest in regulating public passenger vehicles for hire, where the carrier does not hold a federal certificate of convenience and necessity, although the carrier is engaged primarily in interstate commerce."

This argument, carried through pp. 27-40, misapprehends totally the issue here involved. Parmelee treats the transfer operation as a motor vehicle service not subject to the Interstate Commerce Act. Parmelee is twice in error. The truth is (1) that the transfer service is a railroad operation (2) subject to Part I of the Act and other federal statutes. The Court of Appeals so held (R. 203-206). All of Parmelee's Part III argument wholly misses the mark.

All of the cases cited by Parmelee, pp. 27-40, as in support of its argument involve motor vehicles not subject to regulatory statutes, and thus are not in point here. We will hereafter discuss those cases briefly, but we call attention now that the case on which Parmelee chiefly relies, pp. 30-31, *Columbia Terminals Co. v. Lambert*, D.C. Mo., 30 F. Supp. 28 (1939), was decided before the enactment of 49 U.S.C. § 302(c), Sept. 18, 1940, 54 Stat. 920, and thus is distinguishable on that ground alone. The *Columbia Terminals* case is also distinguishable completely on grounds intrinsic to its opinion. See the Opinion of the Court of Appeals in the instant case (R. 211 footnote 26).

Another erroneous Parmelee statement, p. 27, should be noted. Parmelee says: "The Court of Appeals has stricken down the City's plan for regulating terminal vehicles in the interest of public safety and welfare, leaving this important branch of the public transportation of pas-

sengers for hire within the City unregulated by any governmental agency."

That is erroneous in at least four important particulars.

(1) The Court of Appeals held only § 28-31.1 of the ordinance invalid (R. 208). This was part of the amendment of 1955 (R. 44-45). The Court held all of the rest of the ordinance (R. 171-189, 44-45) applicable and valid (R. 208-210, 200). Thus all of the ordinance existing prior to 1955, described by Parmelee, pp. 5-7, and which Parmelee considered adequate regulation, p. 5, still remains applicable and valid under the decision of the Court of Appeals. (2) The transfer vehicles are subject to all of the general motor vehicle traffic safety laws of Illinois and of Chicago and the City police may enforce the state laws. (3) The transfer service is fully regulated under Part I of the Interstate Commerce Act. (4) The 1955 amendment shows on its face that it was not intended as a "plan for regulating terminal vehicles in the interest of public safety and welfare."

#### THE NATURE OF THE 1955 AMENDMENT

The text of the 1955 amendment to Chapter 28 (R. 44-45) and the circumstances of its origin have been set out above, pp. 5-8. It will be noted that new § 28-31.1 accomplishes two things. (1) It provides for the annual renewal or transfer to replacement vehicles of all of the existing Parmelee terminal vehicle licenses without proof of public convenience and necessity. (2) It compels any other applicant for a terminal vehicle license to prove to the satisfaction of the city vehicle license commissioner that "public convenience and necessity" requires issuance of the license, and it provides that upon a favorable report by the commissioner "the council, by ordinance, may fix the maximum number of terminal vehicle licenses to be issued not to

exceed the number recommended by the Commissioner."

In sum and substance new § 28-31.1 gave to the City Council the right to determine by ordinance whether any one other than Parmelee may engage in interstate commerce by terminal vehicle. The sole criterion for Council action is the economic concept of "public convenience and necessity."

There are no possible facets of validity in § 28-31.1. (1) This is not a case where regulatory legislation is aimed at a type of traffic deemed undesirable. Parmelee is permitted to continue with all its vehicles. (2) Section 28-31.1 did not add any safety measures whatsoever to those already existing and applicable in Chapter 28 (R. 171-189). It cannot be justified as a "police power" measure. (3) The provision of numbered subparagraph 2 of § 28-31.1 was not actually intended to reduce traffic congestion. This is so because all of Parmelee's vehicles are left in operation and the ordinance as amended can only add more vehicles.

No decision of the Court ever has sustained a measure of this character. Instead, there are numerous cases holding such an enactment violative of the Commerce Clause. We will proceed to consider the nature of the transfer service, and we will show that under federal statutes and decisions § 28-31.1 is invalid in its application to the service.

#### THE TRANSFER SERVICE IS RAILROAD TRANSPORTATION SUBJECT TO PART I OF THE INTERSTATE COMMERCE ACT

The interstation transfer service is railroad transportation subject to Part I of the Interstate Commerce Act and is being performed *by the railroads* by force of § 202(c)(2) of Part II of the Act, 49 U.S.C. § 302(c)(2), and other federal statutes. Section 302(c) is the following:

§ 302(c) Notwithstanding any provision of this sec-

tion or of section 303, the provisions of this part [Part II], except the provisions of section 304 relative to qualifications and maximum hours of service of employees and safety of operation and equipment, shall not apply—

(1) to transportation by motor vehicle by a carrier by railroad subject to part I, or by a water carrier subject to part III, or by a freight forwarder subject to part IV, incidental to transportation or service subject to such parts, in the performance within terminal areas of transfer, collection, or delivery services; but such transportation shall be considered to be and shall be regulated as transportation subject to part I when performed by such carrier by railroad, as transportation subject to part III when performed by such water carrier, and as transportation or service subject to part IV when performed by such freight forwarder;

(2) to transportation by motor vehicle by any person (whether as agent or under a contractual arrangement) for a common carrier by railroad subject to part I, an express company subject to part I, a motor carrier subject to this part, a water carrier subject to part III, or a freight forwarder subject to part IV, in the performance within terminal areas of transfer, collection, or delivery service; but such transportation shall be considered to be performed by such carrier, express company, or freight forwarder as part of, and shall be regulated in the same manner as, the transportation by railroad, express, motor vehicle, or water, or the freight forwarder transportation or service, to which such services are incidental. (Act of Sept. 18, 1940, 54 Stat. 920; Act of May 16, 1942, 56 Stat. 300.)

If the railroads were performing the transfer service by their own directly owned and operated motor vehicles it would be hard to imagine that anyone would argue that the service was not railroad service under ¶ (1) of § 302(c). Yet the status of the service performed under the contract between the railroads and Transfer (R. 25-43) is, by force

of ¶ (2) of § 302(c), precisely the same as if the railroads were performing it directly under ¶ (1). Thus it will be noted that § 302(c)(2) provides that

“ \* \* \* transportation by motor vehicle by any person (whether as agent or under a contractual arrangement) for a common carrier by railroad subject to Part I \* \* \* in the performance within terminal areas of transfer, collection, or delivery service \* \* \* shall be considered to be performed by such carrier \* \* \* as part of, and shall be regulated in the same manner as, the transportation by railroad \* \* \* to which such services are incidental.” (Emphasis added.)

While this language is entirely clear, it may be noted that Congress meant exactly what it said. See Conference Report, House Report No. 2832, 76th Cong., 3rd Sess., p. 74 § 17(B) (Serial vol. 10444):

“These definitions, as rewritten, also dealt with the case where a person (acting as agent or under a contractual arrangement) performed transfer, collection, or delivery services by motor vehicle within terminal areas for carriers by railroad, express companies, other motor carriers, or water carriers, and provided that in such a case the transportation should be regulated as transportation performed by the person for whom the services were rendered in the same manner as the railroad, express, motor carrier, or water transportation to which the services were incidental.”

The effect of § 302(c)(2) is to merge the identity of Transfer into the railroads. Transfer is simply the *alter ego* of the railroads, and the transfer operation is simply and wholly railroad transportation. *Thomson v. United States*, 321 U.S. 19, 24 (1944); *United States v. Rosenblum Truck Lines*, 315 U.S. 50, 56 (1942). These cases hold that for purpose of regulation generally under the Interstate Commerce Act the agent, though performing all of the

physical service, is integrated into the principal to the extent of losing his own identity. Here the statute so provides in express terms and makes the operation subject to Part I.

Decisions of the Interstate Commerce Commission illustrate the application of § 302(c). Before the section was effective, in *Pick-Up of Livestock in Illinois, Iowa and Wisconsin*, 238 I.C.C. 671 (1940), the Commission cancelled railroad tariffs providing for pick-up of livestock by motor truck within a 10-mile radius of railroad stations on the grounds that the railroads had no motor carrier authority under Part II of the act and that the transportation was not subject to Part I, saying, 238 I.C.C. p. 678:

"It is our conclusion, therefore, that the motor-vehicle operations under consideration are not subject to the provisions of part I, and hence are subject to the provisions of part II. It necessarily follows that they are being conducted without lawful authority, since no certificate that public convenience and necessity require such operations has been sought or obtained."

After § 302(c) was enacted, Sept. 18, 1940, 54 Stat. 920, the Commission reopened the case and held that by force of the statute the proposed pick-up operations by the railroads were now lawful, *Pick-Up of Livestock in Illinois, Iowa and Wisconsin*, 248 I.C.C. 385 (1942), saying, p. 397:

"We find that respondents' schedules and that respondents' pick-up operations and practices thereunder to the extent hereinafter indicated are 'within terminal areas' within the meaning of section 202(c) of part II, and that such truck operations must be regulated as transportation subject to part I of the act. We further find that a lawful terminal area for each station should not exceed a radius of 10 miles, and that the tariffs should clearly and definitely define the areas within which pick-up service is performed."

In *Cartage, Rail to Steamship Lines at New York*, 269 I.C.C. 199, 200 (1947), the Commission held that § 302(c) empowered it to compel railroads to perform interstation transfer service by motor vehicle. In *Movement of Highway Trailers by Rail*, 293 I.C.C. 93, 97-103 (1954), the question was whether railroad owned highway trailers moved on railroad flat-cars in so-called "piggyback" service; and having prior and subsequent movements on their own wheels on city streets, were subject to Part I or Part II; that is, whether the railroads needed authority under Part II in order to perform the operation or any part of it. The Commission held the entire operation subject to Part I, the movement on city streets being subject to Part I by force of § 302(c). Railroad tariffs defining the entire street-rail-street "piggyback" operation as subject only to Part I were held valid in *Trailers on Flatcars, Eastern Territory*, 296 I.C.C. 219 (1955), by reason of § 302(c). This section applies to passenger transfer. *New York, S. & W. R. Co. Application*, 46 M.C.C. 713, 722-725 (1946).

Section 3(4) of Title 49 provides:

"(4) All carriers subject to the provisions of this part shall, according to their respective powers, afford a reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term 'connecting line' means the connecting line of any carrier subject to the provisions of this part or any common carrier by water subject to part III." (Emphasis added.)

"There is no warrant for limiting the meaning of 'con-

neeting lines' to those having a direct physical connection \* \* \* The term is commonly used as referring to all the lines making up a through route." *Atlantic Coast Line R. Co. v. United States*, 284 U.S. 288, 293 (1932). The lines operating the Chicago transfer service all make up through routes through Chicago (R. 7-8, 48-50, 74-79, 190-195), and thus the transfer service in Chicago is performed by connecting lines within the meaning of § 3(4).

By force of 49 U.S.C. § 3(4), *supra*, the railroads "are required to \* \* \* afford motor truck transfer in connection with transportation by rail." *Central Transfer Company v. Terminal Railroad Assn.*, 288 U.S. 469, 473 footnote 1 (1933).

The transfer service is performed pursuant to railroad tariffs filed with the Interstate Commerce Commission (R. 7-8, 74-79, 190-195). While tariffs remain on file they are presumed valid. *Robinson v. Baltimore & Ohio Railroad Co.*, 222 U.S. 506, 508-510 (1912). The tariffs have the force and effect of a statute in compelling performance of the service. *Pennsylvania Railroad Co. v. International Coal Mining Co.*, 230 U.S. 184, 197 (1913).

It clearly appears that the interstation transfer service is railroad transportation subject to Part I of the Interstate Commerce Act, and that for all purpose of regulation the identity of Transfer is merged with the railroads. Hence, Parmelee's assumption that the service is a motor vehicle service not subject to federal regulation is erroneous.

#### PARMELEE'S ARGUMENT

Parmelee's argument, pp. 37-40, to the effect that the transfer service is not railroad service ignores some statutes and authorities and misconstrues the others. Parmelee

points out, p. 39, that in *Status of Parmelee Transportation Co.*, 288 I.C.C. 95, 104 (1953), the Commission held that Parmelee was not a "carrier as defined in Part I of the act." That holding was based on 49 U.S.C. § 302(c)(2) by force of which Parmelee's identity for purpose of regulation was merged into the railroads. That holding accords with the principle to the same effect stated in *Thomson v. United States*, 321 U.S. 19, 24-25 (1944); and *United States v. Rosenblum Truck Lines*, 315 U.S. 50, 56 (1942). But that only emphasizes that the transfer operation is a railroad operation.

Parmelee says, p. 38, that the Interstate Commerce Act "does not require the railroads to provide terminal transfer service." That argument ignores the principle that having filed tariffs requiring performance of the service (R. 7-S, 74-79, 190-195), the railroads are compelled to continue the service while the tariffs remain on file, *Pennsylvania Railroad Co. v. International Coal Mining Co.*, 230 U.S. 184, 192 (1913), and that the Commission has power to forbid cancellation of the tariffs, *Cartage, Rail to Steamship Lines at New York*, 269 I.C.C. 499, 200 (1947). That argument ignores the broad and well established principle that the measure of the railroads' powers, rights, and responsibilities under the act is not limited to what they are "required" to do, but instead, by what they elect to do, which may be beyond any actual requirement. *Barringer & Co. v. United States*, 319 U.S. 1, 8 (1943). Moreover, a permissible service voluntarily undertaken becomes equal in status in all respects to a service initially required by law insofar as the operation, protection, and impact of the Interstate Commerce Act is concerned. *Cincinnati, N. O. & T. P. Railway Co. v. Interstate Commerce Commission*, 162 U.S. 184, 191-192 (1896); *St. Louis Southwestern Ry. Co. v. United States*, 245 U.S. 136, 144 (1917). And finally, Parmelee's

argument ignores the comprehension of this subject expressed by the Court in *Central Transfer Co. v. Terminal Railroad Association*, 288 U.S. 469, 473 footnote 1 (1933), in saying that by force of 49 U.S.C. § 3(4)

"\* \* \* rail carriers subject to it are required to afford \* \* \* motor truck transfer in connection with transportation by rail."

Compare *Donovan v. Pennsylvania Company*, 199 U.S. 279, 295-297 (1905).

#### FEDERAL STATUTES HAVE SUPERSEDED THE POWER OF THE CITY TO ENFORCE § 28-31.1

Being railroad transportation subject to Part I the transfer service is subject to regulation thereunder and to other Federal Statutes respecting railroad transportation. By force of these statutes the power of the City to impose the regulation here in issue has been superseded and is void under the Commerce Clause.

#### THE INTERSTATE COMMERCE ACT

The Interstate Commerce Act was amended in 1906 to include express companies within its coverage for the first time, 24 Stat. 584, 49 U.S.C. § 1(3)(a). This inclusion was held to supersede the power of the City of New York to enforce an ordinance requiring licenses for express company trucks that delivered packages following an interstate railroad haul. *Barrett (Adams Express Co.) v. New York*, 232 U.S. 14 (1914). The Court said, p. 32:

"\* \* \* Congress has exercised its authority and has provided its own scheme of regulation in order to secure the discharge of the public obligations that the business involves. Act of June 29, 1906, c. 3591, 34 Stat. 584."

Answering the argument that the ordinance was valid under the police power the Court said, p. 31:

"Local police regulations cannot go so far as to deny the right to engage in interstate commerce, or to treat it as a local privilege, and prohibit its exercise in the absence of a local license."

To the same effect are *New York Central & Hudson River Railroad Co. v. Hudson County*, 227 U.S. 248, 263 (1913), and *Castle v. Hayes Freight Lines, Inc.*, 348 U.S. 61, 65 (1954). It is clear that 49 U.S.C. § 302(c)(2) supersedes the City's attempted regulation under § 28-31.1 of Chapter 28 (R. 44-45) as fully as the supersession considered in the three cases above cited. We will take up the *Hayes* case more fully later.

#### THE RAILROAD COMMUNICATION AND INTERCHANGE ACT OF 1866

A statute of significance to this case is 45 U.S.C. § 84. It was enacted in 1866 to put an end to an obstruction to interstate commerce by railroad remarkably similar to that here involved, and to outlaw all future obstructions of whatever nature to interstate commerce by railroad. Legislative history is explicit on these points, and the Court has given the statute the meaning and force called for by its history.

The exact form of enactment of the statute is of interest because of its history, 14 Stat. 66:

"CHAP. CXXIV.—*An Act to facilitate commercial, postal, and military communication among the several States.*

"Whereas the Constitution of United States confers upon Congress, in express terms, the power to regulate commerce among the several States, to establish post roads, and to raise and support armies: Therefore:—

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That every railroad company in the United States, whose road is operated by steam, its successors and assigns, be, and is hereby, authorized to carry upon and over its road, boats, bridges, and ferries, all passengers, troops, government supplies, mails, freight, and property on their way from any State to another State, and to receive compensation therefor, and to connect with roads of other States so as to form continuous lines for the transportation of the same to the place of destination: *Provided,* That this act shall not affect any stipulation between the government of the United States and any railroad company for transportation or fares without compensation, nor impair or change the conditions imposed by the terms of any act granting lands to any such company to aid in the construction of its road, nor shall it be construed to authorize any railroad company to build any new road or connection with any other road without authority from the State in which said railroad or connection may be proposed:

*Sec. 2. And be it further enacted,* That Congress may at any time alter, amend, or repeal this act.

“APPROVED, June 15, 1866.”

Both the specific immediate purpose and the general purpose of this Act were stated in some detail in the House Committee Report recommending its passage, House Report No. 31, 38th Cong., 1st Sess., March 9, 1864 (Serial vol. 1206), printed in full in Appendix hereto p. 48. The bill proposed by the Report was passed by the House in the 38th Congress but was not voted upon by the Senate. This same bill was re-introduced as H.R. 11 in the 39th Congress, 1st Session, and was enacted.

The debates in both the 38th and 39th Congresses all revolve about the facts and issues recited in House Report

No. 31. The linkage of 45 U.S.C. § 84 to House Report 31, 1st Sess., 38th Congress, is complete.

The Report shows, *inter alia*: The New Jersey legislature chartered the Camden and Amboy Railroad Company and provided by an act of 1854:

"That it shall not be lawful, at any time during the said railroad charter, (to wit, the Camden and Amboy,) to construct any other railroads in this State without the consent of the said companies, which shall be intended or used for the transportation of passengers or merchandise between the cities of New York and Philadelphia, or to compete in business with the railroad authorized by the act to which this supplement is relative." (New Jersey Session Laws for 1854, p. 387.)"

Under that act the Camden and Amboy obtained an injunction in New Jersey courts forbidding a rival, the Delaware and Raritan Bay Railroad Company, "to carry or aid in carrying passengers and freight between New York and Philadelphia." The tracks of the Delaware and Raritan were in New Jersey but "by means of these roads and boats on Raritan Bay and the Delaware River, a continuous through line is constituted between the cities of New York and Philadelphia."

The House Committee's conclusions were in part the following:

The text of the bill in the 38th Congress, H.R. 307, is not contained in Report No. 31 which accompanied it, but is shown in the debates on passage in the House, 34 Cong. Globe 2253-2264; and the bill as passed appears at page 2264. In the 39th Congress the reintroduced bill was reported "do pass" as H.R. 11 by the Committee on Commerce, 36 Cong. Globe 82, and its proponents stated that it was the same bill as H.R. 307 which had failed to pass in the 38th Congress, 36 Cong. Globe 82-83. It was debated and passed in the House, 36 Cong. Globe 1548-1550, and in the Senate, 36 Cong. Globe 2870-2876.

"In addition to the well-established power of Congress to establish post roads, the committee believe that its power to regulate commerce confers upon it ample authority to grant the petitioners' prayer, and to relieve them from the embarrassments created by the narrow and obnoxious legislation of New Jersey.

"Article 1, section 8, of the Constitution of the United States provides that Congress 'shall have power to regulate commerce with foreign nations, *and among the several States*, and with the Indian tribes.'

"This power has been held to be exclusive in Congress, and that it cannot be abridged or impaired by State legislation:—(*Gibbons v. Ogden*, 9 Wheaton.)

"It clearly appears, from the various opinions given in these celebrated cases, that the power to regulate commerce is absolutely exclusive in Congress, so that no State can constitutionally enact laws or any regulation of commerce between the States, whether Congress has exercised the same power in question or left it free.

"The inference from the various cases cited is that New Jersey, by the law above quoted, and by virtue of which she is attempting to destroy the franchises of the petitioners, has usurped the jurisdiction of Congress, and that we are authorized to interfere to prevent that usurpation from abridging one of the means of communication between New York and Philadelphia."

The Act of June 13, 1866, 14 Stat. 66, 45 U.S.C. § 84, was the means adopted to accomplish the recommended action.

There is remarkable similarity between the New Jersey Act of 1854 and the Chicago ordinance of 1955, in respect both to ends and means. In each case a state legislative body assumed the power to decide whom it would permit to engage in interstate commerce. The Court's decisions

construing 45 U.S.C. § 84 are especially apposite to the instant case.

In *Boyman v. Chicago & North Western Railway Co.*, 125 U.S. 465 (1888), an Iowa statute was held invalid that forbade transportation of intoxicating liquor into the state except where a permit had been issued by the state.<sup>2</sup> The Court, p. 484, *recited most of* § 84, referred to an act authorizing construction of railroad bridges, and said:

“These Acts were passed under the power vested in Congress to regulate commerce among the several States, and were designed to remove trammels upon transportation between different States which had previously existed, and to prevent a creation of such trammels in future, and to facilitate railway transportation by authorizing the construction of bridges over the navigable waters of the Mississippi; and they were intended to reach trammels interposed by state enactments or by existing laws of Congress. \* \* \*. The power to regulate commerce among the several States was vested in Congress in order to secure equality and freedom in commercial intercourse against discriminating state legislation.”

*Union Pacific Railway Co. v. Chicago, Rock Island & Pacific Railway Co.*, 163 U.S. 564 (1896), involved an attempt by Union Pacific to cancel a contract with Rock Island providing for connections and through transportation between the two as *ultra vires* the U.P. Charter. The Court denied the relief sought. After reciting most of 45 U.S.C. § 84 the Court said, p. 589:

“It is impossible for us to ignore the great public

This decision prevailed until in 1913 the Webb-Kenyon Act, 37 Stat. 699, removed the protection of the Commerce Clause from intoxicating liquor. See *Clark Distilling Co. v. Western Maryland Railroad Co.*, 242 U.S. 311 (1917). See a brief comparison of the *Boyman* and *Clark Distilling* cases in *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 424 fn. 29 (1946).

policy in favor of continuous lines thus declared by Congress, and that such it is in effectuation of that policy that such business arrangements as will make such connections effective are made."

It may be noted that the *proviso* of 45 U.S.C. § 84 is in no way applicable here. What the railroads are here seeking to accomplish is not a new operation; they are simply continuing an interstation transfer service that they have been performing for many years, for the past seventeen years, under 49 U.S.C. § 302(c)(2). It is the City that is trying to bring about a new situation, by the enactment of § 28-31.1.

#### THE TELEGRAPH ACT OF 1866

The same Congress that enacted the railroad communication act of 1866, now 45 U.S.C. § 84, also passed the telegraph act, July 24, 1866, 14 Stat. 221, now 47 U.S.C. §§ 1-5, Appendix p. 58. The two statutes have had parallel constructions and both have been cited in the same decisions on the issues of the instant case. Probably the most famous case to emerge from judicial construction of either act is *Pensacola Telegraph Company v. Western Union Telegraph Company*, 96 U.S. 1 (1878). A Florida statute, similar in effect to the Chicago ordinance, forbade any telegraph company to operate lines in interstate commerce except by the state's permission. The Court held that the federal act rendered the state act invalid under the Commerce Clause. This holding is indistinguishable from the issue of the instant case.

On the same day, March 19, 1888, that the Court decided *Bowman v. Chicago & North Western Railway Co.*, 125 U.S. 465, *supra*, it also decided *Western Union Telegraph Co. v. Atty. Gen. of Massachusetts*, 125 U.S. 530. There it was held that a Massachusetts statute was invalid by force of

the telegraph act of 1866, in that it authorized an injunction forbidding operation of the telegraph lines until the company paid its taxes. The Court said, p. 554:

"If the Congress of the United States had authority to say that the Company might construct and operate its telegraph over these lines, as we have repeatedly held it had, the State can have no authority to say it shall not be done."

In *Kansas City Southern Railway Co. v. Kaw Valley Drainage District*, 233 U.S. 75 (1914), both the railroad and telegraph acts of 1866 were cited. The Court held invalid the judgment of a Kansas court ordering the railroad to remove certain bridges, saying pp. 78-79:

"The freedom from interference on the part of the states is not confined to a simple prohibition of laws impairing it, but extends to interference by any ultimate organ. It was held that under the permissive statute authorizing telegraph companies to maintain lines on the post roads of the United States a state could not stop the operation of the lines by an injunction for failure to pay taxes. *Western U. Teleg. Co. v. Atty. Gen.*, 125 U.S. 530; *Williams v. Talladega*, 226 U.S. 404, 415, 416. It would seem that the same principle applies to railroads under the commerce clause of the Constitution, especially if taken in connection with the somewhat similar statute now Rev. Stat. § 5258, U.S. Comp. Stat. 1901, p. 3565 [45 U.S.C. § 84]

"The decisions also show that a state cannot avoid the operation of this rule by simply invoking the convenient apologetics of the police power. It repeatedly has been said or implied that a direct interference with commerce among the states could not be justified in this way. \* \* \*

## GIBBONS V. OGDEN

The instant case affords a perfect example for the application of *Gibbons v. Ogden*, 9 Wheaton 1 (1824). There the New York legislature did not object to steamboats on the Hudson; instead it welcomed them, but only if they were operated under the license granted by the legislature to Fulton and Livingston and their successors. The Court held that the New York act was superseded by the federal coasting license act, 1 Stat. 305, 46 U.S.C. §§ 251 *et seq.*

Here the Chicago City Council does not object to the operation of the interstation transfer vehicles; instead it welcomes them, but only if they are operated under the licenses granted by the Council to Parmelee. Anyone else who wants to operate transfer vehicles in interstate commerce must go to the Council, via the license commissioner, and obtain the passage of an ordinance granting such authority (R. 44-45). Plainly, the ordinance is superseded by the Interstate Commerce Act and the railroad interchange act of 1866. It would be impossible for the railroads to assume their duties under those acts and at the same time yield to § 28-31.1 of the Chicago ordinance.

Moreover, one purpose of the railroad communication act of 1866 was to make the principle of *Gibbons v. Ogden* applicable to railroads. See pp. 28-29 above.

In *Harmon v. Chicago*, 147 U.S. 396 (1893), the Court held a Chicago ordinance invalid under the rule of *Gibbons v. Ogden*, *supra*, 9 Wheaton 1: The ordinance "exact[ed] a license \* \* \* for the privilege of navigating the Chicago river and its branches by tug boats." The tugs had federal coasting licenses. Citing *Gibbons v. Ogden*, the Court said, pp. 406-407:

"\* \* \* The requirement that every steam tug, barge, or towboat, towing vessels or craft for hire in the Chi-

cago river or its branches shall have a license from the City of Chicago, is equivalent to declaring that such vessels shall not enjoy the privileges conferred by the United States, except upon the conditions imposed by the city. This ordinance is, therefore, plainly and palpably in conflict with the exclusive power of Congress to regulate commerce, interstate and foreign. \* \* \*"

### CASTLE V. HAYES FREIGHT LINES

*Castle v. Hayes Freight Lines*; 348 U.S. 61 (1954) has roots running directly to the railroad and telegraph acts of 1866 and to the decisions construing them. The *Hayes* case held invalid an Illinois statute authorizing state officials to forbid a motor carrier to operate on the state's highways for a fixed period as a penalty for habitual violation of state laws regulating the maximum weight of trucks. The Court said, pp. 63-64, that since Congress had vested the Interstate Commerce Commission with power to suspend or revoke motor carrier certificates:

"\* \* \* it would be odd if a state could take action amounting to a suspension or revocation of an interstate carrier's commission-granted right to operate. Cf. *Hill v. Florida*, 325 U.S. 538."

*Hill v. Florida*, 325 U.S. 538 (1945), cited in the foregoing excerpt, held invalid a Florida statute which forbade anyone to act as representative of a labor organization unless licensed as such by the state. The Court held that this requirement was invalid because in conflict with the provision of the National Labor Relations Act giving employees freedom to choose their own representative, saying p. 543:

"It is the sanction here imposed \* \* \* which brings about a situation inconsistent with the federally protected process of collective bargaining. Cf. *Western Union Telegraph Co. v. Atty. Gen.*, 125 U.S. 530, 553,

554; *Kansas City Southern R. Co. v. Kaw Valley Drainage Dist.*, 233 U.S. 75, 78; *St. Louis Southwestern R. Co. v. Arkansas*, 235 U.S. 350, 368."

The federal statutes that authorize and compel the railroads to perform the interstation transfer service have superseded power at least equal in force to the federal acts given effect in *Gibbons v. Ogden*, 9 Wheaton 1; *Pensacola Telegraph Co. v. Western Union Telegraph Co.*, 96 U.S. 1; and *Castle v. Hayes Freight Lines*, 348 U.S. 61. Any interruption of the transfer service would collide with the duty of the railroads to perform it under their tariffs, and with the power of the Interstate Commerce Commission to compel it.

#### WHO SHALL CONDUCT INTERSTATE COMMERCE

It is to be noted that the exercise of state power which the Court has forbidden in these leading cases is the power to say *who* shall engage in federally authorized interstate commerce. In these cases the states did not object to or attempt to stop steamboat traffic, telegraph lines, truck lines, or union business agents; they only wanted to say *who* should conduct these activities. But the Court held that the exercise of state power to decide *who* should conduct the operation was just as much of an obstruction to the commerce as an outright stoppage of it would be. Exactly the same principle is applicable here.

#### PARMELEE'S AUTHORITIES

As heretofore noted, pp. 16-17, the cases cited by Parmelee, pp. 27-40, have no relevancy to the issue here, which is whether the City can regulate in the fashion provided by § 28-31.1 of Chapter 28, the interstation transfer service subject to 49 U.S.C. § 302(c)(2). *Columbia Terminals v. Lambert*, D.C. Mo., 30 F. Supp. 28 (1939), aff. 309 U.S. 620, was decided before the enactment of § 302(c)(2), Sept. 18,

1940, 54 Stat. 920; and in any event that case is clearly against Parmelee insofar as it reached the issue here involved. See the Opinion of the Court of Appeals (R. 211 footnote 26).

The authorities on which Parmelee relies do not include any cases posing the issue whether state authorities can require proof of public convenience and necessity as a condition to providing interstate service. The Court clearly pointed out in *Fry Roofing Co. v. Wood*, 344 U.S. 157 (1952), heavily relied upon by Parmelee, that Arkansas had no right to require proof of public convenience and necessity or to exercise any other form of discretionary licensing power even though the motor carrier had no federal authority. In the instant case the only power that the City could possibly exercise under § 28-31.1 is the power to determine public convenience and necessity because that is the only form of power contained in that section. In the *Fry* case the Court concluded its opinion by defining precisely the issue decided, as follows, p. 163:

“\* \* \* we hold only that Arkansas is not powerless to require interstate motor carriers to identify themselves as users of that state's highways.”

In the instant case the City has precisely that power of identification by license by force of §§ 28-5, 28-6, 28-10, and 28-11 of Chapter 28 (R. 174, 177), and no one is disputing that power. What appellees-respondents are contesting here, and what the Court of Appeals held invalid (R. 208), is precisely the power which Arkansas lacked and which the Court in the *Fry* case plainly said would be in excess of the state's power.

Every state act that has come before the Court where proof of public convenience and necessity was required before conducting interstate transportation, as by § 28-31.1

of Chapter 28, or where some equivalent economic test was required, or where any discretionary licensing power over interstate commerce was asserted, has been held invalid even in the absence of federal occupancy of the field. *Buck v. Kuykendall*, 267 U.S. 307, 315-316 (1925); *Bush v. Maloy*, 267 U.S. 317, 324-325 (1925); *St. Clair County v. Interstate Sand & Car Transfer Co.*, 192 U.S. 454, 469 (1904); *Sault Ste. Marie v. International Transit Co.*, 234 U.S. 333, 340 (1914); *Vidalia v. McNeely*, 274 U.S. 676, 683 (1927); *Michigan Public Utilities Comm. v. Duke*, 266 U.S. 570, 576-577 (1925); *Toomer v. Witsell*, 334 U.S. 385, 403-404, 406 (1948).

## 14.

#### ANSWER TO PARMELEE'S PARTS IV AND V

Section 28-31.1 of Chapter 28 is invalid on its face as applied to the interstate commerce here involved. It is all one piece and the railroads could not be required to comply with it under any possible assumptions.

Parmelee says, p. 40, that "the Court of Appeals erred in presuming that the ordinance would be unconstitutionally applied." A reading of §28-31.1 of Chapter 28, p. 7, above, shows at once that it could not possibly be applied in any manner or degree to the interstate transportation here involved under 49 U.S.C. § 302(c)(2) except in an unconstitutional manner. The very first step required, an application to the vehicle license commissioner for the opportunity to prove that public convenience and necessity requires the interstate commerce here involved, is *per se* an unconstitutional demand that cannot be required. *Smith v. Cañoon*, 283 U.S. 553, 562 (1931); *Michigan Public Utilities Comm. v. Duke*, 266 U.S. 570, 575 (1925); *Lovell v. Griffin*, 303 U.S. 444, 453 (1938); *Toomer v. Witsell*, 334 U.S. 385, 403-404 (1948).

Parmelee makes an argument, which, to the best of our understanding, is that maybe § 28-31.I would not be applied in an unconstitutional manner. But how under its terms could it possibly be applied otherwise, when the first step must be an application for the privilege of proving public convenience and necessity for the right to conduct interstate commerce by railroad under 49 U.S.C. 302(c)(2)? As the Court said in *Kansas City Southern Railway Co. v. Kaw Valley Drainage District*, 233 U.S. 75, 78, *supra*, ordinances of this character "must be taken as they read on their face. \* \* \* They cannot be qualified by speculation as to what is likely to happen in fact."

In *Smith v. Cahoon*, 283 U.S. 553, *supra*, the argument was made by the state, similar in effect to Parmelee's argument here, that the carrier ought to be required to apply for a license under a statute requiring proof of public convenience and necessity, and then see what would happen. The Court rejected this argument, pointing out that either the statute was void on its face because it required proof of public convenience and necessity, or that it was void because it lacked any other criteria for official action after the public convenience and necessity requirement was ignored or deleted. The Court said, p. 564:

\* \* \* Either the statute imposed upon the appellant obligations to which the state had no constitutional authority to subject him, or it failed to define such obligations as the state had the right to impose with the fair degree of certainty which is required of criminal statutes.

Similarly, in the instant case, the only criterion for action by the Commissioner and by the Council is proof of public convenience and necessity, a requirement that cannot be applied to interstate commerce; and the theory that some other standard would be applied by the Commissioner and

the Council is wholly untenable where there are no provisions in the section upon which any other criteria could be based.

← The foregoing considerations apply to Parmelee's argument, pp. 44-45, that the railroads should be required to "exhaust their administrative remedies." What "administrative remedies" is Parmelee talking about? The only one provided by § 28-31.1 is to apply for a certificate of public convenience and necessity to conduct interstate commerce, and that cannot be required, as pointed out above.

The argument is made, pp. 41-42, that the phrase "public convenience and necessity" in § 28-31.1 may be construed to include some lesser criterion than transportation economics; and, so the argument runs, therefore be held valid. It is suggested that the phrase may permit withholding of authority "on grounds relating to the valid exercise of the police power." There are several obvious answers to that.

The Supreme Court of Illinois and this Court have uniformly held that the phrase "public convenience and necessity" includes only the economic regulation of transportation and not any elements of the police power. In *Egyptian Transportation System v. Louisville and Nashville R. Co.*, 321 Ill. 580, 587-588, 152 N.E. 510, 512-513 (1926), the Court said:

"To authorize an order of the Commerce Commission granting a certificate of convenience and necessity to one carrier though another is in the field it is necessary that it appear first that the existing utility is not rendering adequate service. (*West Suburban Transportation Co. v. Chicago and West Towns Railway Co.*, 309 Ill. 87.) The method of regulation of public utilities now in force in Illinois is based on the theory of a regulated monopoly rather than competition, and before

one utility is permitted to take the business of another already in the field it is but a matter of fairness and justice that it be shown that the new utility is in a position to render better service to the public than the one already in the field. (*Chicago Motor Bus Co. v. Chicago Stage Co.*, 287 Ill. 320.) It is in accord with justice and sound business economy that the utility already in the field be given an opportunity to furnish the required service."

In *The Commerce Commission v. Chicago Railways Company*, 362 Ill. 559, 566, 1 N.E. 2d 65, 68-69 (1936), the Court said:

"Before the enactment of the Public Utilities Act such highways and streets were open to competition by any company which sought to carry passengers, provided it had the proper highway consent. The purpose of the Utilities act was to control this competition so that such service would not be destroyed because of ruinous competition but would be protected under proper regulation."

In *Schiller Piano Co. v. Illinois Northern Utilities Co.*, 288 Ill. 580, 585-586, 123 N.E. 631, 633 (1919), the Court said:

"The Public Utilities act of this State has no relation to the public health, safety or morals, but was enacted to protect the public against unreasonable charges and discrimination and to promote the general welfare."

In many other cases the Illinois Court has held without exception that the phrase "public convenience and necessity" in the Illinois Public Utilities Act, Ill. Rev. Stat., 1955; Bar Assn. Ed., Ch. 111½, § 56, set out in part in appendix hereto, relates only to economic regulation of competition, monopoly, rates, services, and other economic

factors, and does not embrace any elements of police power regulation.<sup>3</sup>

Section 28-31.1 was copied bodily from § 28-22.1 of Chapter 28 which regulates taxicabs (R. 183-184). This section was construed by the Supreme Court of Illinois in 1947 to be a measure for the economic regulation of the taxicab business, a means of limiting the number of cabs for the purpose of limiting competition, and was held valid. *Yellow Cab Co. v. City of Chicago*, 396 Ill. 388, 71 N.E. 2d 652. While Illinois has that power in respect to intrastate commerce by taxicab it has no such power in respect to interstate commerce.

In *Interstate Commerce Commission v. Parker*, 326 U.S. 60 (1945), the Court was called upon for construction and application of the phrase "public convenience and necessity" in the Interstate Commerce Act. The Court said *inter alia*, p. 69:

"Public convenience and necessity should be interpreted so as to secure for the Nation the broad aims of the Interstate Commerce Act of 1940." (citing cases).

The Act of 1940 created 49 U.S.C. § 302(c), 54 Stat. 920. Obviously the "broad aims" of that act cannot be realized if the City of Chicago is to be permitted to set its own standards of public convenience and necessity for interstate commerce which is performed pursuant to § 302(c).

However, the short and immediately dispositive answer is that the interstate transportation here involved could

<sup>3</sup> *Eagle Bus Lines, Inc. v. Illinois Commerce Commission*, 3 Ill. 2d 66, 119 N.E. 2d 915 (1954); *Chicago & West Towns Railways, Inc. v. Illinois Commerce Commission*, 383 Ill. 20, 43 N.E. 2d 320 (1943); *Bartonville Bus Line v. Eagle Motor Coach Line*, 326 Ill. 200, 157 N.E. 175 (1927); *Illinois Power & Light Corp. v. Commerce Commission*, 320 Ill. 427, 151 N.E. 326 (1926).

not be barred for any reason, particularly where the transportation is not considered objectionable and denials would be made only on a selective basis. *Castle v. Hayes Freight Lines*, 348 U.S. 61 (1954); *Gibbons v. Ogden*, 9 Wheaton 1 (1824); *Pensacola Telegraph Co. v. Western Union Telegraph Co.*, 96 U.S. 1 (1878).

## 5.

**ANSWER TO PARMELEE'S PART VI**

If § 28-31.1 is taken at face value it is invalid on its face. Parmelee's attempts to construe it to mean something else than what it says on its face, in an attempt to save it, affords occasion for proper resort to legislative history.

Parmelee argues, pp. 48-49, that the Court's resort to legislative history was improper. The cases Parmelee cites, pp. 49-51, are not apposite to this contention, and are not relevant to any issue here. The reason for this resort to legislative history is plainly stated by the Court, and appears again in Parmelee's brief here. Parmelee urged in the Court of Appeals (R. 208), and argues here, pp. 40-44, that the plain words of § 28-31.1 should be construed to mean something else than what they say. It actually does not matter what that something else is, since Parmelee's conception of it in any event is the power to select the agency to perform interstate commerce, a power which the City lacks. But to show the basic fallacy of Parmelee's contention the Court cited (R. 208) the legislative history (R. 90-96) which shows that the Council Committee was interested only in guarding Parmelee from new competition in interstate commerce and was not interested in any valid police power considerations.

The materials of legislative history were official documents of the City (R. 93-96), and a reporter's transcript

of the first meeting of the Committee (R. 90-93). The truth and accuracy of these documents have never been questioned. They may properly be considered. *United States v. International Union U.A.W.*, 352 U.S. 567, 570 (1957); *Western Sand & Gravel Corp. v. Town of Cornwall*, 2 Ill. 2d 560, 564, 119 N.E. 2d 261, 264 (1954).

The principle of resort to legislative history is too well understood to require argument. *United States v. International Union*, *supra*. It is established in the law of Illinois. In *City of Rockford v. Schultz*, 296 Ill. 254, 257, 129 N.E. 865, 866 (1921) the Court said, in words closely applicable to the instant case:

"The object in construing a statute is to ascertain and give effect to the legislative intent, and to that end the whole act, the law existing prior to its passage, any changes in the law made by the act, and the *apparent motive for making such changes*, will be weighed and considered." (Emphasis added.)

There the Supreme Court of Illinois resorted to the report of a special committee of the legislature to ascertain "the apparent motive" in amending a statute.

In *Dean Milk Co. v. Chicago*, 385 Ill. 565, 570, 33 N.E. 2d 612, 615 (1944), the Court said:

"The Rules for the construction of an ordinance are the same as those applied in the construction of a statute."

The Court there considered a large amount of extrinsic legislative history and testimony of expert witnesses to determine the meaning of the ordinance, citing the foregoing as justification for such procedure.

In *People v. Olympic Hotel Bldg. Corp.*, 405 Ill. 440, 445, 91 N.E. 2d 597, 600 (1950), the Court said:

"Resort to explanatory legislative history has been declared not to be forbidden no matter how clear the words may first appear on superficial examination. (*Harrison v. Northern Trust Co.*, 317 U.S. 476.)"

In the case cited in the foregoing excerpt this Court made the statement attributed to it in consulting the report of a committee.

In *Bashuizen v. Thompson & Taylor Co.*, 360 Ill. 160, 163, 195 N.E. 625, 626. (1935), the Court said:

"For the purpose of passing upon the construction, validity or constitutionality of a statute the court may resort to public official documents, public records, both State and national, and may take judicial notice of and consider the history of the legislation and the surrounding facts and circumstances in connection therewith."

It is entirely clear that the Court of Appeals reached the conclusion that § 28-31.1 is invalid on its face under the Commerce Clause without taking the legislative history into consideration (R. 205-208). The Court did not resort to legislative history as a basis for concluding that § 28-31.1 is invalid, but only to answer an argument of Parmelee and the City to the effect that the section should be given a meaning differing from its plain terms. Thus the legislative history at the most hardly rises to the dignity of cumulative evidence on this issue, and clearly had no effect upon the Court's conclusions in reaching its decision that the section is invalid.

#### THE LEGISLATIVE HISTORY IS TOO PATENT IN THE FRAMEWORK OF THIS CASE TO BE OVERLOOKED

Independently of the foregoing however, the legislative history of § 28-31.1 of Chapter 28 is just too patent and too pervading in the framework of this case to be overlooked.

The progression of events reveals an impressively purposeful, and temporarily successful, course of action that cannot be ignored.

The most superficial glimpse of these events is fully revealing. For some years Chapter 28 of the Chicago Municipal Code had regulated *inter alia* "terminal vehicles" (R. 171-189). These were defined (R. 172) as a "public passenger vehicle which is operated under contracts with railroad and steamship companies, exclusively for the transfer of passengers from terminal stations." Parmelee had the only contract. On June 13, 1955, the railroads announced that they were discontinuing their relations with Parmelee and had arranged with Transfer to perform the service beginning October 1, 1955 (R. 82). On July 26, 1955, the Council passed the 1955 amendment to Chapter 28 (R. 44-45).

New § 28-31.1 gave to the City Council the right to determine by ordinance whether anyone other than Parmelee may engage in interstate commerce by terminal vehicle. And the sole criterion for Council action is the economic concept of "public convenience and necessity."

These public events, occurring between June 13 and July 26, 1955, could mean only that the City and Parmelee were trying to perpetuate Parmelee as the transfer agent of the railroads and to prevent Transfer from performing the service. And the City and Parmelee never made any secret of the fact that such was their purpose. They stoutly defended § 28-31.1 in the District Court and filed a joint brief in the Court of Appeals, insisting that § 28-31.1 was applicable to respondents' transfer service and was valid and that they intended to enforce § 28-31.1 against the railroads and Transfer. They are making the same contentions here.

These public events clearly reveal the City's and Parmelee's purpose without resort to the proceedings of the Council Committee on Local Transportation. But any interested person looking at the Council proceedings (R. 44) could not fail to notice reference to the Committee's report. From there it is most natural to go to the official records of the Committee's proceedings (R. 93-96). Assuredly one is not compelled to be so blind or naive as not to notice these interesting official records which so clearly corroborate the plain meaning of the public events leading to the enactment of § 28-31.1.

## 6.

### ANSWER TO PARMELEE'S PART VII

Parmelee's part VII argument apparently assumes that the Court of Appeals held all of Chapter 28 invalid, and the argument is thus without foundation. But if Parmelee means by "sanctions" the power to determine who shall engage in interstate commerce, then the argument is doubly erroneous.

We have pointed out above, p. 5, that the Court of Appeals held only § 28-31.1 (R. 44-45) invalid (R. 208) and held the rest of Chapter 28 (R. 171-189) valid and applicable (R. 208-209, 200). There thus remain in Chapter 28 licensing provisions as comprehensive as legitimate exercise of the police power can permit.

Hence there is no basis for Parmelee's argument that the Court's judgment deprived the City of any lawful or needed licensing power.

Parmelee's argument comes down to saying that in addition to all of the rest of the ordinance the City ought to have § 28-31.1. That argument is fully met in our part 3 above, p. 15.

## CONCLUSION

The Court should hold that appellant-petitioner does not have standing to seek review on appeal or by writ of certiorari, or should affirm the judgment of the Court of Appeals.

Respectfully submitted,

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## APPENDIX

38TH CONGRESS,  
1st Session.

HOUSE OF REPRESENTATIVES

REPORT  
No. 31.

DELAWARE AND RARITAN BAY RAILROAD  
COMPANY.

[To accompany bill H. R. No. 307.]

MARCH 9, 1864.—Ordered to be printed.

MR. DEMING, from the Committee on Military Affairs,  
made the following

REPORT.

*The Committee on Military Affairs, to whom was referred  
the petition of the Raritan and Delaware Bay  
Railroad Company, respectfully report:*

The petitioners pray that their roads and the boats connected with them may be declared post and military roads of the United States.

The committee find that the petitioners have completed a road of sixty-five miles in length, from Port Monmouth, near Sandy Hook, to Atsion, nearly east of the city of Philadelphia; and that they also have the control of the Camden and Atlantic Railroad Company; and that the two roads are connected by the Botsto branch of the Camden and Atlantic Railroad Company; and that, by means of these roads and boats on Raritan bay and the Delaware river, a continuous through line is constituted between the cities of New York and Philadelphia.

The committee find that since the petition was brought before this committee the chancellor of New Jersey, at the suit of the Camden and Amboy Railroad Company, has enjoined the use of the petitioners' roads, except for local purposes, and has ordered that the Raritan and Delaware Bay Railroad Company pay to the Camden and Amboy Railroad Company all sums collected by the former for through business, including the amount received for transportation of troops; and that the chancellor decreed that the petitioners' road had no right to carry or aid in carrying passengers and freight between New York and Philadelphia.

The committee find that the act of the State of New Jersey, by authority of which the petitioners have been enjoined from carrying on their roads passengers and freights between New York and Philadelphia, is as follows: "That it shall not be lawful, at any time during the said railroad charter, (to wit, the Camden and Amboy,) to construct any other railroads in this State without the consent of the said companies, which shall be intended or used for the transportation of passengers or merchandise between the cities of New York and Philadelphia, or to compete in business with the railroad authorized by the act to which this supplement is relative."—(New Jersey Session Laws for 1854, p. 387.)

The committee find that from the 1st of September, 1862, to the 1st of June, 1863, there were transported from New York to Philadelphia, over the petitioners' road, 17,428 men, 649 horses, and 806,245 pounds of freight, under the orders of the government.

The committee find that Congress has five times exercised the power of establishing post roads. The first case in which it was exercised is to be found in volume 10 United States

Statutes at Large, page 112, where, in sections 6 and 8 of an act making appropriations for the Post Office Department, it is enacted that the bridges across the Ohio river at Wheeling, in the State of Virginia, and at Bridgeport, in the State of Ohio, abutting on Jane's island, in said river, are hereby declared to be lawful structures in their present position and elevation, and shall so be held and taken to be, anything in any law or laws of the United States to the contrary notwithstanding; and that said bridges are declared to be, and are, established *post roads for the passage of the mails* of the United States.

The second instance in which Congress exercised the power is to be found in "An act to establish certain post routes, and to discontinue others, (5 U. S. Statutes at Large, p. 271,) where, in section 2, it is provided that each and every railroad within the limits of the United States which now is, or hereafter may be, made and completed, shall be a post route, and the Postmaster General shall cause the mail to be transported thereon.

The third instance is in "An act to establish certain post roads," approved March 3, 1853, (U. S. Statutes at Large,) where the same legislation is reaffirmed; and it is again enacted in section 3 of said act, "that all railroads which now, or hereafter may be, in operation, be, and the same are hereby, declared to be post roads."

The fourth instance in which Congress exercised the right is found in volume 12, U. S. Statutes at Large, pp. 569, 570, where, in "An act to establish certain post roads," in sections 1 and 2, it is enacted "that the bridge partly constructed across the Ohio river, at Steubenville, in the State of Ohio, abutting on the Virginia shore of said river, is hereby declared to be a *lawful structure*."

"That the said bridge and Holliday's Cove railroad are hereby declared a public highway and established a *post road*, for the purpose of transmission of mails of the United States, and that the Steubenville and Indiana Railroad Company, chartered by the legislature of the State of Ohio, and the Holliday's Cove Railroad Company, chartered by the State of Virginia, or either of them, are authorized to complete, maintain, and operate said road and bridge when completed, as set forth in the preceding section, anything in the law or laws of the above-named States to the contrary notwithstanding."

The fifth congressional precedent is to be found in volume 12, U. S. Statutes at Large, p. 334. In "An act to authorize the President of the United States in certain cases to take possession of railroad and telegraph lines, and for other purposes," approved January 31, 1863, it is enacted that "the President of the United States, when in his judgment the public safety may require it, be, and he is hereby, authorized to take possession of any or all the railroad lines of the United States, so that they shall be considered *post roads, and part of the military establishment* of the United States."

Your committee find that the Supreme Court has affirmed the constitutionality of the act of Congress in reference to the Wheeling bridge. In 12th Howard, 528, the Supreme Court, after the passage of the act in question, denied a motion to punish the owners of the bridge for a contempt in rebuilding it, and affirm in the following words, "that the act declaring the Wheeling bridge a lawful structure was within the legitimate exercise by Congress of its constitutional power to regulate commerce."

In addition to the well-established power of Congress to establish post roads, the committee believe that its power

to regulate commerce confers upon it ample authority to grant the petitioners' prayer, and to relieve them from the embarrassments created by the narrow and obnoxious legislation of New Jersey.

Article 1, section 8, of the Constitution of the United States provides that Congress "shall have power to regulate commerce with foreign nations, *and among the several States*, and with the Indian tribes."

This power has been held to be exclusive in Congress, and that it cannot be abridged or impaired by State legislation.—(*Gibbons vs. Ogden*, 9 Wheatons.)

When the State of New York undertook to restrict navigation by local law, in granting to Livingston & Fulton an exclusive right to navigate the waters of New York with vessels propelled by steam, the Supreme Court of the United States, through Chief Justice Marshall, declared the restriction to be illegal, because it interfered with commerce between the States, and, in his opinion, he raised the intention of the Constitution above the narrow interpretation of the word "*commerce*," which would confine it to the transportation of property, and declared it embraced all inter-State communications, and the whole subject of intercourse between the people of the several States; thus ascribing to Congress the power to regulate the transit both of persons and property through and across contiguous or intervening States. In this case Chief Justice Marshall says:

"But in regulating commerce with foreign nations, the power of Congress does not stop at the jurisdictional lines of the several States. It would be a very useless power if it could not pass these lines. The commerce of the United States with foreign nations is that of the whole United

States. Every district has a right to participate in it. The deep streams which penetrate our country in every direction pass through the interior of almost every State in the Union, and furnish the means for exercising this right. If Congress has the power to regulate it, that power must be exercised wherever the subject exists. If it exists within the States, if a foreign voyage may commence or terminate at a port within a State, then the power of Congress may be exercised within a State."

In the case of the State of Pennsylvania *vs.* The Wheeling and Belmont Bridge Company, 18 Howard, 421, the State of Pennsylvania claimed the right to limit and control the means of transit across the Ohio river to the State of Ohio upon grounds of State interest, which were sustained by the Supreme Court so long as Congress refrained from legislation upon the same subject. By the law of Pennsylvania these bridges were condemned as nuisances, and the Supreme Court affirmed the condemnation. But the public demand for the increased commercial facilities afforded by these condemned structures claimed and received the attention of Congress, and, under its unquestioned power to regulate commerce and to establish post roads, it enacted in respect to each of these bridges that they were and should continue to be lawful structures, anything in any State law to the contrary notwithstanding. The Supreme Court sustained the action of Congress, as legalizing by its paramount authority the structures with the State sovereignty condemned, and they are now established as permanent post routes.

The argument by which the power of Congress to interpose in this and similar cases, when the general interests of commerce are embarrassed and impaired by local State legislation, is set forth with great clearness and force in

the opinion of the Supreme Court, delivered by Justice Nelson, in the case just cited. It concedes the right of State sovereignty within its own limits, and by its own legislative acts or compacts, to restrict or to encourage the enterprise of its own citizens, in the use of its own territory. But all such legislation is subject and subordinate to the constitutional power of Congress to regulate commerce among the States, and whenever that is exercised the local State laws and compacts must give way. If this were not so, the constitutional grant of the power would be a vain thing.

In the passenger cases, 18 Howard, 283, the Supreme Court holds that the statutes of New York and Massachusetts, imposing taxes upon alien passengers arriving at the ports of those States, was in derogation of the article of the Constitution which gives power to Congress to regulate commerce with foreign nations and among the States, and therefore unconstitutional and void.

In expressing the opinion of the Court, Judge McLean says, page 400: "Shall passengers, admitted by act of Congress without a tax, be taxed by a State? The supposition of such a power in a State is utterly inconsistent with a commercial power, either paramount or exclusive, in Congress."

Judge Grier says, page 462: "To what purpose commit to Congress the power of regulating our intercourse with foreign nations and among the States, if these regulations may be changed at the discretion of each State? And to what weight is that argument entitled which assumes that because it is the policy of Congress to leave this intercourse free, therefore it has not been regulated, and each State may put as many restrictions upon it as she pleases?"

It clearly appears, from the various opinions given in these celebrated cases, that the power to regulate commerce is absolutely exclusive in Congress, so that no State can

constitutionally enact laws or any regulation of commerce between the States, whether Congress has exercised the same power in question or left it free.

The inference from the various cases cited is, that New Jersey, by the law above quoted, and by virtue of which she is attempting to destroy the franchises of the petitioners, has usurped the jurisdiction of Congress, and that we are authorized to interfere to prevent that usurpation from abridging one of the means of communication between New York and Philadelphia.

The committee find, therefore, that Congress has, in these cases, exercised the power which the petitioners ask may be interposed in their behalf, and that, both under the clause of the Constitution which authorizes it to establish post offices and post roads, and under the clause which authorizes it to regulate commerce, it has the clear right to grant petitioners the relief for which they pray. The committee find, moreover, that the State of New Jersey has, by her own legislative action, impliedly admitted the right of Congress to establish a railroad between New York and Philadelphia. By the sixth section of an act relating to the Camden and Amboy Railroad and Transportation Company, it is declared that when any other railroad or roads for the transportation of passengers and property between New York and Philadelphia, across this State, shall be constructed and used for that purpose, under or by virtue of any law of this State or *the United States authorizing or recognizing said road*, that then, and in that case, the said dividends shall no longer be payable to the State, and the said stock shall be retransferred to the company by the treasurer of this State.

The committee come now to consider the question whether the present application presents a proper case for the exer-

cise of the powers which it has already been shown Congress possesses. In answering this question it should be borne in mind that the exercise of this power is invoked, not only by the petitioners, but also by the government, and by the travelling and trading community, who now earnestly seek new channels of communication between New York and Washington. It appears by a letter addressed by General Meigs to the special committee investigating the propriety of establishing a new railroad between here and New York, that the government requires not only all the available means, but additional facilities, for the transportation of troops and munitions of war over the line which is partly covered by the roads of the petitioners, and that it has more than once been constrained to relieve the existing lines by water conveyance of troops to the capital. It also appears that during the recent freezing of the Potomac, the insufficiency of our means of transportation for military purposes was painfully apparent, and I have already stated that on one memorable occasion, when great promptness and great exertions were required, the petitioners greatly aided the government in the conveyance of troops and warlike material to the seat of war; and their reward has been an injunction from through transportation, and an order to account to the Camden and Amboy company for the money which they received for this service. No matter how urgent the emergency; no matter how imperative the demand of the army for re-enforcements, the roads of the petitioners are now closed, not only against the government, but against the citizens of every State; and troops, munitions of war, and travellers, are only permitted to pass from New York to Philadelphia over the roads of the monopoly. The quartermaster's department of the city of New York a few days ago applied to the petitioners to transport a regiment to Philadelphia, and the application was denied, because

such transportation had been enjoined by the chancellor of New Jersey.

In this connexion it is worthy of remark that since the injunction the rates of traffic upon the Camden and Amboy railroad have been unexpectedly and suddenly advanced.

The fact that additional accommodations for trade and travel between New York and Philadelphia is demanded as well by the government as for public convenience, is supported by the action of Congress and of the legislatures of the States.

On the 12th of the present month a resolution was passed by the House of Representatives which declares in its preamble "that the facilities for convenient and expeditious travel and transportation of troops between the cities of New York and Washington, especially between New York and Philadelphia, are at present notoriously inconvenient and inadequate."

Congress has also been officially informed that the legislatures of the States of Maine and New York have requested their representatives and instructed their senators to urge upon us the necessity for increasing the facilities for convenient and expeditious travel between the cities of New York and Philadelphia, and which, in the language of the resolutions, are stated to be "at present notoriously inconvenient and inadequate."

It has never been claimed that any State has the right to inhibit the transit across its territory of passengers and merchandise. The committee are unable to appreciate any distinction between a total inhibition of transit and the permission to use only a specified route, whose limited means virtually amount at least to a partial, if not a total, prohibition. Both the government and the public require con-

stant and prompt means of communication, and anything which prevents this is a prohibition which ought not to be tolerated.

Under the facts already stated, the question presented by the applicants resolves itself into this: Is it expedient for Congress to authorize a road which was legally constructed under proper State authority, and which has a legal right to transport passengers and merchandise from the Delaware river to Raritan bay, to commence such transportation from the city of Philadelphia, on the opposite side of the Delaware, and continue it to the city of New York, on the opposite shore of the Raritan? The necessities of the government, the necessities of the public, and the absolute rights of commercial intercourse, all require that this question should be answered in the affirmative.

The Committee on Military Affairs therefore unanimously recommend the passage of the accompanying bill.

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#### TELEGRAPH ACT OF 1866

47 U.S.C. § 1. Use of public domain. Any telegraph company organized, under the laws of any State, shall have the right to construct, maintain, and operate lines of telegraph through and over any portion of the public domain of the United States over and along any of the military or post roads of the United States which have been or may hereafter be declared such by law, and over, under, or across the navigable streams or waters of the United States; but such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters, or interfere with the ordinary travel on such military or post roads.

§ 2. Use of materials from public lands. Any telegraph company organized under the laws of any State shall have the right to take and use from the public lands through which its lines of telegraph may pass, the necessary stone, timber, and other materials for its posts, piers, stations, and other needful uses in the construction, maintenance, and operation of its lines of telegraph, and may preempt and use such portion of the unoccupied public lands subject to preemption through which their lines of telegraph may be located as may be necessary for their stations, not exceeding forty acres for each station; but such stations shall not be within fifteen miles of each other.

§ 3. Government priority in transmission of messages. Telegrams between the several departments of the Government and their officers and agents, in their transmission over the lines of any telegraph company to which has been given the right of way, timber, or station lands from the public domain shall have priority over all other business, at such rates as the Postmaster General shall annually fix. And no part of any appropriation for the several departments of the Government shall be paid to any company which neglects or refuses to transmit such telegrams in accordance with the provisions of this section.

§ 4. Purchase of lines. The United States may, for postal, military, or other purposes, purchase all the telegraph lines, property, and effects of any or all companies acting under the provisions of sections 1 to 6 of this title, at an appraised value, to be ascertained by five competent, disinterested persons, two of whom shall be selected by the Postmaster General of the United States, two by the company interested, and one by the four so previously selected.

§ 5. Acceptance of obligation to be filed. Before any telegraph company shall exercise any of the powers or

privileges conferred by law such company shall file their written acceptance with the Postmaster General of the restrictions and obligations required by law.  
(Act of July 24, 1866, 14 Stat. 221).

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CHAPTER 111½

56. Certificate of convenience and necessity.]

§ 55. No public utility shall begin the construction of any new plant, equipment, property or facility which is not in substitution of any existing plant, equipment, property or facility or in extension thereof or in addition thereto, unless and until it shall have obtained from the Commission a certificate that public convenience and necessity require such construction.

No public utility not owning any city or village franchise nor engaged in performing any public service or in furnishing any product or commodity within this State and not possessing a certificate of public convenience and necessity from the State Public Utilities Commission or the Public Utilities Commission, at the time this Act goes into effect shall transact any business in this State until it shall have obtained a certificate from the Commission that public convenience and necessity require the transaction of such business.

Whenever after a hearing the Commission determines that any new construction or the transaction of any business by a public utility will promote the public convenience and is necessary thereto, it shall have the power to issue certificates of public convenience and necessity.

